RE YAU KIN MUN, EX P PUBLIC FINANCE BHD (NO 2)

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[BANKRUPTCY NO: 29-209-1998]
5 MAY 2000

BANKRUPTCY: *Petition - Reinstatement of creditor's petition dismissed due to creditor's absence - Whether Bankruptcy Act 1967 & Rules 1969 provides for reinstatement of petition - Whether creditor must present a fresh petition with leave of court - Bankruptcy Rules 1969, rr. 120, 276*

BANKRUPTCY: *Petition - Reinstatement of creditor's petition dismissed due to creditor's absence - Whether Bankruptcy Act 1967 & Rules 1969 provides for reinstatement of petition - Whether a lacunae in Act and Rules - Whether r. 276 of the Rules comes into operation - Whether O. 32 r. 5(4) Rules of the High Court 1980 applies to reinstate petition*

The judgment creditor ('JC') applied to reinstate its creditor's petition against the judgment debtor ('JD') which had been dismissed because neither the JC nor its counsel appeared for the hearing of the petition. The deputy registrar dismissed the application. Hence, this appeal.

The JC submitted that r. 120 of the Bankruptcy Rules 1969 ('the Rules') did not state that a creditor's petition should be dismissed if the creditor failed to appear on the hearing of the petition. Therefore, there was a *lacunae* in the Rules whereby r. 276 of the Rules would come into play so that O. 32 r. 5(4) of the Rules of the High Court 1980 ('RHC') could be applied to reinstate the petition.

Held:

[1] Although r. 120 of the Rules does not state that the neglect of the petitioning creditor to attend the hearing of his petition will result in a dismissal of the petition, there is no doubt that that will be the result if there is such a neglect. This is because the registrar hearing the matter will have no choice but to dismiss the petition for the simple reason that: (i) there is no one to prosecute the petition; and (ii) the rule itself contemplates that if a creditor neglects to appear on his petition, it will result in the petition being dismissed.

[2] Rule 120 of the Rules expressly provides a procedure whereby a petition that has been dismissed may come before the court again at the instance of the same creditor against the same debtor in respect of the same act of bankruptcy with leave of the court. It followed that the Bankruptcy

Act 1967 and the Rules deliberately do not provide for a procedure to reinstate a dismissed petition. Therefore, r. 276 of the Rules may not be resorted to and O. 32 r. 5(4) RHC does not apply to reinstate a petition.

[3] This application had obviously been worded and drafted as an application to reinstate a dismissed petition. Therefore, the court could not accept the JC's submission to now regard it as an application for leave to present a subsequent petition against the same debtor on the same act of bankruptcy.

[4] If the court was wrong in holding that r. 276 of the Rules could not be resorted to, the court would not have ordered a reinstatement of the creditor's petition anyway for the reason that the court could not accept the explanation given by the JC or its solicitors on their absence on the date of the hearing of the petition.

[Appeal dismissed.]

Case(s) referred to:
Mariam Sasiman v. BBMB Factoring Bhd [1999] 5 CLJ 294 ***(foll)***
Permata Chartered Merchant Bank Bhd v. Hiew Fook Realty & Ors [1992] 1 MLJ 73 ***(dist)***
Re Yap Ying Long, ex p FCJ Sdn Bhd [2000] 1 CLJ 542 ***(not foll)***

Legislation referred to:
Bankruptcy Rules 1969, rr. 114(2), 120, 127, 276
Rules of the High Court 1980, O. 32 r. 5(4)

For the appellant - Leonard Yeoh Soon Beng; M/s Soo Thien Ming & Nashrah
For the respondent - Shidev Singh (LH Singh with him); M/s LH Singh & Co

Reported by Usha Thiagarajah

JUDGMENT

Clement Skinner JC:

The sole issue that arises for determination in this appeal is whether a creditor's petition, which had been dismissed for the reason that on the date fixed for its hearing, the petitioning creditor had neglected to appear, may be reinstated to the list.

The issue arose in this way. On 20 October 1998, the appellant (hereafter 'the judgment creditor') caused to be issued against the respondent (hereafter the 'judgment debtor'), a creditor's petition seeking to have him adjudicated a bankrupt. The act of bankruptcy relied upon in the petition was the judgment debtor's non-compliance with a bankruptcy notice served on him on 5 June 1996, requiring him to pay the amount of RM208,801.49 due on a judgment obtained against him on 28 April 1986.

The creditor's petition was fixed for hearing on 7 October 1999, before the deputy registrar. On that day, when the petition was called on, neither the judgment creditor nor its counsel were present, but counsel for the judgment debtor was. In the result, the deputy registrar struck out the petition.

On 11 October 1999, the judgment creditor filed a summons-in-chambers applying to have its creditor's petition reinstated to the list and for a date to be fixed for its hearing. To support its application for reinstatement, the judgment creditor filed two affidavits to explain why it neglected to appear on its petition. The first affidavit was sworn by the solicitor having charge of the matter. He explained that his firm only managed to serve the creditor's petition on the judgment debtor on 4 October 1999. Rule 114(2) of the Bankruptcy Rules 1969 (hereafter 'the Rules') requires that there be at least eight clear days between the service and hearing of a creditor's petition. Realising that there would not be eight clear days between the date of service of the petition and the date fixed for its hearing, the solicitors for the judgment creditor requested a firm of solicitors in Ipoh to appear on their behalf on 7 October 1999 to obtain a new date for the hearing of the creditor's petition. The second affidavit was sworn by the solicitor from the Ipoh firm who was to appear for the abovementioned purpose. He explained that on 7 October 1999, he arrived late at the Ipoh High Court as he was engaged in another matter at the Sessions Court, Ipoh, which had taken longer than he had anticipated in dealing with. For that reason too, he did not arrange for anyone else to appear on his behalf or on behalf of the petitioning creditor's solicitors at the Ipoh High Court that day.

The judgment creditor's application for reinstatement was heard by the deputy registrar on 27 January 2000, when it was dismissed. In doing so, the learned deputy registrar felt bound by the decision in *Mariam Sasiman v. BBMB Factoring Bhd* [1999] 5 CLJ 294. In that case, a creditor's petition was dismissed because on the date of hearing before the Senior Assistant Registrar ('SAR') the judgment creditor was absent. The judgment creditor subsequently applied for reinstatement of the petition and the application was allowed by the SAR. On appeal, Faiza Tamby Chik J held, *inter alia*, that the SAR had no discretion to allow a reinstatement of the creditor's petition as the Bankruptcy Act 1967 and the Rules did not contain provisions allowing for such a reinstatement. In the course of his decision, Faiza Tamby Chik J also considered the question whether there was a lacuna in the Rules so as to warrant the application of r. 276 of the Rules so that the Rules of the High Court could be resorted to reinstate the dismissed petition. The learned judge found that there was no lacuna in the Rules because r. 120 clearly dealt with the consequence of a petitioning creditor not attending on the hearing of his petition; in such an event, on a literal interpretation of r. 120, the petition

must be dismissed and no subsequent petition by the same creditor against the same debtor in respect of the same act of bankruptcy can be presented without the leave of the court.

I should point out that when the judgment creditor's application for reinstatement was heard by the learned deputy registrar, the decision of Abdul Aziz J in *Re Yap Ying Long, ex p FCJ Sdn Bhd* [2000] 1 CLJ 542 (to which I shall refer shortly), had not yet been reported.

In arguing this appeal, Mr. Leonard Yeoh of counsel for the judgment creditor referred to the provisions of r. 120 of the Bankruptcy Rules which is in the following terms:

> If any creditor neglects to appear on his petition no subsequent petition against the same debtor or debtors or any of them, either alone or jointly with any other person shall be presented by the same creditor in respect of the same act of bankruptcy without the leave of the Court.

It was counsel's submission that r. 120 does not state that if a creditor neglects to appear on his petition, it will result in the petition being either dismissed or struck out. Instead, according to counsel, r. 120 merely provides that a subsequent petition against the same debtor may not be presented by the same creditor in respect of the same act of bankruptcy without the leave of the court. Counsel also submitted that r. 120 does not address the question of whether a creditor, whose petition had been struck out or dismissed because the creditor had neglected to appear on the hearing of the petition, may apply to have it reinstated. In the circumstances, submitted counsel, there is a lacuna in the rules by reason whereof, r. 276 of the Rules would come into operation so that O. 32 r. 5(4) Rules of the High Court (RHC), (which permits an application that had been made in chambers but which had been struck out in the absence of the party making it, to be reinstated to the list), may be resorted to so that in the context of what has happened here, the creditor's petition may be restored to the hearing list.

In support of his submission, counsel for the judgment creditor relied on the recent decision of Abdul Aziz J in the case of *Re Yap Hing Long; ex p FCJ Sdn. Bhd. (supra)*, where the learned judge held that as r. 120 was not designed to answer the question whether a creditor, whose petition had been struck out because of his absence can apply to have it reinstated instead of having to present a fresh petition with leave of the court, and, as the question was not answered elsewhere in the rules, the learned judge held that r. 276 of the Rules

could be relied upon to render applicable O. 32 r. 5(4) RHC 1980 to reinstate the petition to the list. Abdul Aziz J, also held that as r. 120 did not state that presenting another petition was the only course open to such a creditor, it ought not to be inferred that it intended to say so. In coming to his decision the learned judge declined to follow the decision in *Mariam Sasiman v. BBMB Factoring* [1999] 2 AMR 1664.

Relying on the decision in *Re Yap Ying Long, ex p FCJ Sdn Bhd (supra)* counsel for the judgment creditor urged me to reinstate the petition to the list.

As a fall back position, counsel submitted that if leave of court was required to present a fresh petition pursuant to r. 120, then the application to reinstate was such an application and should be allowed. Counsel submitted that grave injustice would be occasioned to the judgment creditor if its petition was not reinstated as any fresh petition it may file may face the objection that more than 12 years have elapsed between the date of judgment and the presentation of a new petition.

The efforts of the judgment creditor before the deputy registrar and, now before me, are directed at having its creditor's petition, which had been dismissed, come before the court again. However, for reasons of its own, the judgment creditor does not wish to avail itself of the avenue open to it under r. 120 of the Rules which allows a creditor, whose petition has been dismissed by reason of a creditor's neglect to attend on the hearing of its petition, to present with leave of the court, a fresh creditor's petition against the same debtor relying on the same act of bankruptcy. Instead, the judgment creditor perceives it has a right to apply for a reinstatement of its dismissed petition; a right not mentioned anywhere in the Act and neither a procedure provided for in the Rules, but which counsel for the judgment creditor hopes to achieve by arguing that as there is a lacuna in the Rules, r. 276 of the Rules should be resorted to. That rule reads as follows:

> 276 Rules of High Court applicable in event of lacuna
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> In the absence of any rule regulating any proceeding under the Act or the Rules, the Rules of the High Court shall apply, *mutatis mutandis*.

The question is, is there an absence of rules regulating what happens when a creditor's petition is fixed for hearing and the consequences arising therefrom?

To me, there is no absence of such rules. Very specific rules are found in r. 114 through to r. 127 regulating the hearing of a creditor's petition. Of particular relevance to the issue at hand is r. 120, which expressly deals with the situation where a petitioning creditor neglects to attend on the date fixed for the hearing of his petition. Although the rule does not state that such neglect will result in a dismissal of the petition, I have no doubt that that

will be the result if a creditor neglects to attend on the hearing of his petition. I say so for two reasons. First, when a petition is called on for hearing and neither the creditor nor his solicitor is present, the registrar hearing the matter will have no choice but to dismiss the petition for the simple reason that there is no one to prosecute the petition. Secondly, r. 120 itself contemplates that if a creditor neglects to appear on his petition, it will result in the petition being dismissed. If that was not the case, there would be no need to provide a procedure to regulate the presentation of a subsequent petition by the same creditor against the same debtor based on the same act of bankruptcy. It should be noted that r. 120 does not prohibit a creditor, whose petition has been dismissed for neglect to attend, from coming before the court again without having to obtain leave. Such a creditor may issue and serve a fresh bankruptcy notice in respect of the debt still owed and when the new bankruptcy notice is not complied with, present a fresh creditor's petition.

In my judgment, r. 120 having expressly provided a procedure whereby a petition that has been dismissed may come before the court again at the instance of the same creditor against the same debtor in respect of the same act of bankruptcy, the Act and Rules deliberately do not provide for a procedure to reinstate a dismissed petition to the list.

For the reasons given above, I must reject the submission that resort may be had to r. 276 of the Rules so as to enable the provisions of O. 32 r. 5(4) RHC to apply here. For the same reasons, I respectfully decline to follow the decision in *Re Yap Ying Long, ex p FCJ Sdn Bhd (supra).*

Counsel for the judgment creditor also referred to the case of *Permata Chartered Merchant Bank Bhd v. Hiew Fook Realty & Ors* [1992] 1 MLJ 73, but I found that case did not help. It related to a lacuna in the RHC applicable to the hearing of an appeal from the decision of the registrar to a judge-in-chambers.

With regard to the submission by counsel for the judgment creditor that if leave pursuant to r. 120 was required, the application now before the court is an application for such leave, I regret I cannot accept this submission. The notion that somehow, by counsel simply saying so, an application, which has so obviously been worded and drafted as an application to reinstate a dismissed petition, can suddenly transform itself into or double-up as an application for leave to present a subsequent petition against the same debtor relying on the same act of bankruptcy, is somewhat misconceived. I accordingly refuse to consider it as such an application.

If I am wrong in my view that r. 276 of the Rules cannot be resorted to and that consequently the judgment creditor is not precluded from applying for a re-instatement of its dismissed petition, I wish to say that I would not have ordered a reinstatement of the creditor's petition for the reason that I did not find the explanation given for the absence of the judgment creditor or its solicitors on the date of hearing of the petition acceptable.

Faced with a situation where he was required to be present at the Sessions Court and the High Court on the same day, the Ipoh solicitor decided he should be at the Sessions Court first. It was open to the Ipoh solicitor to give reasons for the decision he made but he has offered none. Apart from giving the number of the suit which he was attending to, the Ipoh solicitor made no attempt to explain what the matter in the Session Court involved and when it was first fixed so as to show that there were reasonable grounds for his decision to attend the Sessions Court first and why it took longer then anticipated. The fact that the Ipoh solicitor felt that he could deal with his case at the Sessions Court before attending the High Court suggests that he had ascertained what position on the hearing list for the day the case at the Session Court occupied and what position on the hearing list the creditor's petition occupied, thereby showing it was reasonable in the circumstances to make the decision he did. However, the Ipoh solicitor has not stated what steps he had taken in this regard. The Ipoh solicitor also did not say anything about whether he is the only solicitor in his firm so that he had no choice but to attend to both the matters himself on that day. In the absence of the information described above, I find the explanation given by the Ipoh solicitor unacceptable. It does not afford a reasonable explanation for the judgment creditor's or its solicitors neglect to appear on its petition so that discretion may be exercised in its favour.

In the result, I dismiss this appeal with costs.